UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ASHFORD PRESBYTERIAN COMMUNITY HOSPITAL **and** **FEDERACIÓN PUERTORRIQUEÑA DE TRABAJADORES (FPT)**	**CASE NO. 12-CA-165682**

REPLY TO GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

In accordance with § 102.46(e) of the Rules and Regulations of the National Labor Relations Board, as amended, 29 CFR § 102.46(e), the undersigned attorney appears on behalf of Ashford Presbyterian Community Hospital ("the Hospital"); and files this Reply to the General Counsel's Answering Brief to the Hospital's Exceptions to the decision of the Administrative Law Judge ("the GC's Brief):

INTRODUCTION

On May 31, 2017, the Hospital filed Exceptions to the ALJ's Decision finding the Hospital, by not paying the 2015 Christmas Bonus to its employees, violated the National Labor Relations Act ("the Act") by unilaterally changing the terms of employment for its Units A, B and C; and by modifying the Collective Bargaining Agreements ("the CBAs") of Units A and B. On July 21st, the GC filed an Answering Brief to the Hospital's Exceptions.

First, the GC's Brief fails to account for the fact that prior to executing the CBAs, the parties did bargain over the applicability of all the provisions of Law 148 to the issuance of a Christmas Bonus. Second, the GC consistently faults the Hospital with not giving prior notice before requesting an exemption, when the ALJ ruled the CBAs arguably allowed the Hospital to request an exemption. Third, the GC refuses to accept the Hospital *did* receive the exemption

from the 2015 Christmas Bonus; and that the Secretary of the Department of Labor did not have the authority to refuse to grant the exemption to unit employees. Finally, the GC Brief cannot argue with the fact that the Hospital did appropriately respond and object to the payment of back pay to individuals that were no longer employed by the Hospital at the time of the facts in controversy.

I. The Parties Executed an Agreement by which all Provisions of Law 148 applied to the Christmas Bonus and therefore, the Hospital could Benefit from the Exemption of Law 148 when its Financial Situation Requires

The GC's Brief misrepresents the Hospital's argument that since 2010, the Union has agreed to Law 148 **and all its provisions** applying to the issuance of a Christmas Bonus, and executed CBAs to this effect. GC'S Brief at 19-20. The Hospital is not arguing the Union waived its right to bargain, and the "clear, unmistakable waiver standard" simply does not apply. Instead, it is a matter of what the evidence demonstrates the parties agreed to during bargaining.

The GC, on the other hand, contends the Christmas Bonus, as a term and condition of employment, is a right to payment that requires bargaining prior to nonpayment. The Board has recognized Christmas Bonus' that are (1) either terms and conditions of employment that are ongoing due to an employer's past practice in spite of not being agreed to in a contract; and (2) those consecrated in labor agreements, where the exact terms of what is agreed to are in writing. *See e.g. Waxie Sanitary Supply and Building Material*, 337 NLRB No. 43, 316 (2001) (annual bonus was a term and condition which must be reinstituted and maintained in effect "until any modification is negotiated with the Union or an impasse in bargaining is reached"); *Bonnell/Tredegar Indus*., 313 NLRB No. 313, 791 (1994) (Christmas Bonus was a contractually agreed to condition of employment that "shall remain in full force during the term of [the] Agreement.") Here, the parties executed an agreement whereby a certain amount would be paid

each year as a Christmas Bonus in accordance with Law 148, including all the law's provisions. Thus, the provisions of Law 148 would determine the responsibilities of the employer, including the date of payment and recipients; as well as the rights of the employer, including the right to request an exemption when paying the bonus isn't financial viable. It cannot be a Christmas Bonus is a matter that the employer must resurrect as a bargaining issue each year, when the parties have already executed an agreement on the terms of a bonus. If this is so, the agreement means nothing.

GC insists there was no evidence demonstrating the Union had agreed during bargaining to the Hospital being able to request the exemption. GC's Brief at 20, n. 7. This completely ignores the Hospital's Human Resource Director's express testimony to this effect[1]:

> Q. BY MR. MUNOZ NOYA: Do you recall what occurred in the negotiations for the collective bargaining agreement subsequent to the ones expiring 2009 and 2008 concerning the Christmas Bonus
> A. Yes
> Q. Could you tell us?
> A. Once the three, the three agreements had expired as had been seen in the economy or downturn in the economy in the Hospital as well as in the country, we requested from the FPT reasonable amount of time to initiate new negotiations of an agreement.
> Q. I'm asking you concerning specifically the Christmas Bonus
> A. The Union was in agreement. And when the negotiations started regarding the Christmas bonus article, a proposal was made to the Union. A proposal was made to modify the text regarding the Christmas bonus article.
> ….. [discussions amongst counsel and the ALJ)
> By Mr. Muñoz Noya: Who proposed changing the language?
> A. The Hospital
> Q: What was the result of the proposal of the Hospital?
> A. It was accepted by the Union and signed on all three collective bargaining agreements. And it has been the text in the Christmas bonus – it has been the text used in the Christmas Bonus in all subsequent committee agreements, negotiations.
> Trial Transcript ("TT"), p. 106-09.

[1] This testimony was referenced on page 8 of the Respondent's Brief in Support of the Exceptions to the ALJ's decision.

> Q. BY MR MUNOZ NOYA: What was the discussion concerning the applicability of the law during those negotiations concerning the Christmas bonus law?
>
> MR MUNOZ NOYA: And maybe you can translate as she goes because I think it will be easier, I suggest.
>
> THE WITNESS: It would not be applicable – it would be applicable, all the disposition of aforementioned – of the mentioned law regarding the Christmas bonus, including the ruling when the Hospital does not have earnings can request the exemption of the payment of the Christmas bonus for a particular year.
>
> TT at 115, l. 19-26; 116, l. 1-4.

The GC did not offer any evidence to contradict this testimony, and yet it went unmentioned in the ALJ's Decision. On the other hand, the GC makes much of 2015 having been the first year since 1995 that the Hospital has requested an exemption under Law 148. GC Brief at 44. This fact is irrelevant. Nothing requires the Hospital request the exemption whenever its losses are sufficient to qualify under the Law—it is a right of the Hospital to do so.

GC also contends "Respondent's construction of the language of its collective-bargaining agreements implausibly would allow it to pick and choose which provisions of Law No. 148 apply and which ones do not, based on its sole discretion, and ignores Article 6 of Law No. 148." GC Brief at 30. The Hospital recognizes Article 6 instructs that Law 148 does not apply to employees that receive annual bonuses by way of private labor agreements, except that if that annual bonus provides for less than what Law 148 mandates be paid, the employer must pay the difference. First, the 2015 Christmas Bonus is not strictly an "annual bonus." It is a bonus given to unit employees in accordance and under the conditions of Law 148. Second, while Law 148 does not automatically apply to employees that receive annual bonuses by private agreements, that does not mean the law cannot be incorporated into a private agreement and apply to these employees. GC's construction of the agreements, on the other hand, is that all provisions of Law 148 apply to the issuance of a Christmas Bonus (because the parties agreed they would), except the allowance of an exoneration when the employer requests it in conformity with the law then it

does not apply, and that failure to pay by the date prescribed by Law results in back pay and interest, and compensation for adverse tax expenses from being paid in a year other than 2015. GC's Brief at 36. This interpretation is not only self-serving, but also requires the ALJ express an opinion on the terms of the agreement between the parties. This is beyond the jurisdiction of the Board, on the basis of the employer's interpretation of the agreement also being sound and reasonable. *BathIron Works Corp*., 345 NLRB 499, 501-02 (2005).

II. In 2015, the Hospital Gave the Union Notice and Opportunity to Bargain Prior to Not Paying the Christmas Bonus

As the ALJ ruled, the CBAs between the parties arguably allowed the Hospital to request an exemption from paying the bonus. **The allegedly illegal activity (according to the ALJ) was therefore not paying the bonus on December 15, 2015; it was not illegal to request an exemption in November.** Notwithstanding, the GC Brief argues the Hospital violated the Act by giving notice of the exemption request on December 1st and at the same moment offering the opportunity to discuss. *See,* GC Brief at 18.

While it is correct that prior to requesting an exemption the Hospital did not expressly alert the Union of its intent to do so (though it did provide financial evidence of falling within the category allowable under law for requesting an exemption), the Hospital did inform the Union that it had requested and received the exemption prior to not paying the Christmas Bonus, which did not take place until December 15, 2015—14 days after notice was given. TT at 52, l. 12-25; 53, l. 1. The Hospital did not alert the Union of the exemption request prior to receiving confirmation from the Department of Labor of having granted the exemption because, until that moment, the Hospital was still under obligation to pay the bonus; and the Department of Labor let the Hospital know it could inform the employees once it received the exemption. TT at 118, l. 13-25.

CG cites to *Ciba-Geigy Pharm. Div*., 264 NLRB No. 134 (1982) for the proposition that an employer does not satisfy his duty to bargain when even while meeting with the union, it manifests the position that it does not have to bargain. In *Ciba-Geigy* however, the employer during an April 21st meeting notified the Union of an attendance plan effective in May. In response, the Union asked for statistical information and the opportunity to review the plan. On the 25th, 26th and 27th of April, the employer proceeded to mail out letters to those employees identified as having particular attendance problems. The Board determined the employer unilaterally implemented the new plan and the request to bargain was not genuine.

The situation between the Hospital and the Union is not even similar. The Hospital expressed its position on December 1st, after which it received letters of discontent from the Union. TT at 33, l. 5-14. The parties had set a bargaining meeting to discuss the subsequent CBA for employees in Unit B on December 4th. TT at 120, l. 13-25. The Union cancelled this meeting. After a December 11th meeting to bargain for the CBA for Unit B, and after the Hospital's Bargaining Committee had left the meeting room, the Union President (for the first time in person) expressed his discontent with the Hospital's request for an exemption and made a proposal for payment of the bonus in two parts. TT at 110, l. 1-7. This proposal was made with only the Human Resource Director remaining in the room as the sole representative of the Hospital. The Director stated it was a shame the proposal had not been brought up during the bargaining meeting, and rejected the proposal. TT at 110, l. 1-7; 142, l. 1-11. Regarding Units A and C, the parties never met and the Union never made a proposal, waiving its rights. *Ciba-Geigy Pharm. Div*., 264 NLRB at 1018 ("short notice of several days is sufficient to permit an employer to implement a proposed change in conditions, if the union ha[s] not requested bargaining in that short time.")

Finally, the ALJ ruled that on December 1, 2015, the employees received notice of the request for exoneration before the Union. Contrary to the GC's assertion, this is not evidence "supported by the record as a whole." GC's Brief at 35. As the GC concedes, this finding is based solely upon the Union President's testimony that on December 1st, he received multiple phone calls from employees regarding the Hospital's nonpayment of the 2015 Christmas Bonus, including a call from his wife. TT at 63-64, 73. The other evidence presented at trial shows 1) a meeting with the supervisors of the employees was scheduled for 11:30am on December 1st (evidence supported by the Human Resource Director's personal agenda; 2) the fax notifying the Union of the Hospitals request for an exemption was sent 11:57am (evidence in the form of a copy of a fax). GC Brief at 11, fn. 5; TT at 52, l. 1-11; 113, l. 6-15. The Union President's receipt of multiple phone calls between 11:30 and 11:57 was not verified by phone records, or other testimony by the employees themselves who allegedly called and notified him.

III. The Hospital Received an Exemption from Paying the 2015 Christmas Bonus

The GC conclusively states there is no evidence showing the Hospital received a communication granting its request for exemption as to unit employees. GC Brief at 12. GC makes no mention of the telephone call the Human Resource Director made to the Department of Labor regarding the exemption request, or the Department's response indicating that the exemption had been granted and that the employees could be notified of the non-payment of the bonus. Nor does the GC except to these findings of fact by the ALJ. *See*, JD-21-17 at 6, l. 31-38. The Human Resource Director did not testify this phone call was limited to non-unit employees.

The GC also objects to the Board giving any consideration to a public document released from the PRDOL listing the Hospital among those entities exempt from paying the 2015 Christmas Bonus. Hospital's Post-Trial Brief, Exh 1; Opposition to General Counsel's Motion to

Strike, Exh. 1. The GC complains the document was not presented into evidence and is not on the record. GC Brief at 33-34. However, the GC does not cite to any precedent in support of an argument for why the Board cannot take notice of a public document released by a public agency. *See,* cases cited to in fn. 1 of the Hospital's Brief in Support of its Exceptions to the ALJ's Decision at 14.

IV. The Secretary of the Department of Labor did not have the Authority to Refuse to Grant the Exemption for the Unit Employees

In its Exceptions, the Hospital argued the Secretary must exempt the Hospital if it demonstrates the total bonus amount to be paid exceeds 15% of its net profits for the preceding fiscal year. The GC contends it is up to the Secretary to order the exemption and the Secretary has broad authority to make decisions regarding employment. GC Brief at 23-24. Notwithstanding its authority, the Secretary also has a duty to uphold local labor laws. For example, to assure that an employer who requests an exemption is financially eligible under the Law, the Secretary can "request and require the employers to furnish under oath … any available information with regard to the balance sheets, profit and loss statements… and any other information he deems necessary, etc, for the best administration of this chapter." The Secretary is also empowered "to audit and examine the employer's books, accounts, files and other documents on his own or through his subordinates to determine their responsibility towards their employees under this chapter." He does not however have the authority to refuse to recognize an exemption to an employer who has complied with the law.

It is the ALJ that has qualified the Secretary's authority. The GC argues the ALJ was correct in deciding that even if the Secretary grants an exemption, if the employer does not bargain with the Union, the Secretary's exemption apparently has no effect, and the employer must still pay the bonus. Consequently, GC argues that the reasoning in *El Vocero de PR v.*

Union de Periodistas de Artes Gráficas, is inconsequential. GC's Brief at 31-32. This case was cited to for the purpose of confirming that the employer of unit employees can seek the exoneration of the bonus contemplated by Law 148. *Id.*, KLAN201100327, 2012 P.R. App. LEXIS 2783 (P.R. App. Ct. August 30, 2012). **There would be no point to this ruling or going through the process of seeking the exemption if, additionally, the employer had to bargain prior to not paying**. According to the ALJ, the exemption is therefore superfluous.

This reasoning on the part of both the GC and the ALJ is based solely on *Hosp. Santa Rosa Inc*, which is why this decision does qualify as a new ruling and a new policy regarding the Christmas Bonus which should not be applied retroactively to the 2015 non-payment of the bonus. GC's Brief at 25-27. The CG's Brief does not assert that in either *SJ Bautista Med. Crt.*, 356 NLRB 736 (2011), or in *Hosp. San Carlos Barromeo*, 355 NLRB 153 (2010); did the Board decide that even if the Secretary granted the exemption expressly for unit employees, the employer would still be required to bargain with the union. Actually in the latter case, as the GC admits, the Board decided that if the statute had been the sole basis for entitlement to the Christmas Bonus, financial problems *would* allow the employer to request the exemption and legally not pay the bonus to all its employees.

V. Former employees that no longer formed part of the units on the date of December 15, 2015 only had a right to a bonus in accordance with Law 148, for which the Hospital was exempt

The GC's Brief extensively responds to the Hospital's exception to the ALJ's decision that the Hospital did not properly oppose the GC inclusion of individuals within the Compliance Specification that were employed by the Hospital at some point during the Christmas Bonus period but were not employed at the due date. GC Brief at 38-44.

The GC contends the Hospital's answers to the Compliance Specification do not sufficiently describe the Hospital's objection of the inclusion of those individuals. Notwithstanding, the Hospital in all its responses to various allegations, assert the employees only had a right to a bonus under Law 148. GC Exh 1(j); 1(k); 1(s); 1(aa). Additionally, during trial, both parties questioned the Human Resource Director on the Christmas Bonus due to the Hospital's former employees. TT at 114, l. 18-25; 115, l. 1-5. Finally, in response to the GC's Motion submitting the last version of the Compliance Specification, the Hospital "reserved the right to present its position regarding the names and amounts included in the Appendices." *See*, GC's Motion for the Receipt of GC Exhibit 12 in Evidence and Close Record. GC does not contest this last fact and does not even discuss it in the GC's Brief.

CONCLUSION

The ALJ must uphold the terms of the CBA that was agreed to by the parties. And the parties must respect the terms of the agreements they execute. Otherwise, these agreements mean nothing. Both parties agreed Law 148, in its totality, would apply to the issuance of a Bonus. This includes the right of the employer to request an exemption when the total bonus amount to be paid by an employer exceeds 15% of its net profits.

WHEREFORE, it is respectfully requested the Board reverse the ALJ's Decision and dismiss the Complaint and Compliance Specification.

RESPECTFULLY SUBMITTED on August 4, 2017.

s/ Amanda Collazo Maguire
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